

Daily Journal Newswire Articles

www.dailyjournal.com

© 2010 The Daily Journal Corporation. All rights reserved.

• select Print from the File menu above

PERSPECTIVE • Jan. 05, 2010

Holmes v. Holmes

By Benjamin Shatz

Before James Bond, Bart Simpson, and Mickey Mouse, the world's most famous fictional character was Sherlock Holmes. Devotion to Holmes spawned millions of dedicated fans, and hardcore "Sherlockians" would take offense at calling him fictional (explaining that Sir Arthur Conan Doyle was Dr. Watson's literary agent, rather than the creator of both Holmes and Watson). Over a century since his first appearance - in *A Study In Scarlet* (1887) - his name remains synonymous with the profession of private detection and with deductive reasoning generally (although technically his work primarily was inductive reasoning). In light of his well known "methods," critical thinking and logical analysis, and the subject matter of his reported "cases," a canon of four novellas and 56 short stories that remain popular today, invariably raising issues of law and forensics, it is not surprising that Holmes has particular appeal to lawyers. (There is no need to comment on parallels between the practicing bar and Holmes' arrogant egotism, quirky personality or substance abuse.)

Holmes' worldwide popularity extends even to the far-flung shores of California. The Guinness World Records lists him as "the most portrayed movie character" - having appeared in over 200 movies by over 70 actors - which alone would make him popular in the entertainment capital of the world. Sherlockian scholar Leslie S. Klinger, editor of the three-volume set *The New Annotated Sherlock Homes* (W.W. Norton 2004, 2005) earned his law degree from the University of California, Berkeley School of Law and is a tax and estates lawyer living in Malibu. No doubt other California bar members have a similar passion for Holmes.

The name Sherlock Holmes is a catchphrase for someone with intellectual prowess. This is often used mockingly, however, as in the phrase "It does not take a Sherlock Holmes to see that..." E.g., *Desny v. Wilder*, 46 Cal.2d 715 (1956); *Stroock & Stroock & Lavan LLP v. Tendler*, 2006 WL 307708 (2d Dist. 2006); *People ex rel. Allstate Ins. Co. v. Weitzman*, 107 Cal.App.4th 534 (2003); *People v. Tuadles*, 7 Cal.App.4th 1777 (1992); *Walton v. Will*, 66 Cal.App.2d 509 (1944) ("Officers employed to make arrests are not required to be doctors of the law or to possess the genius of Sherlock Holmes.")

His ability to solve difficult cases has endeared him to judges. In *Silver Blaze*, he famously solved a mystery by noting the "curious incident of the dog in the night," i.e., focusing on the fact that the guard dog did *not* bark, he concluded that the culprit must have been someone the dog knew well. This has become the quintessential "negative clue," referenced in many California judicial opinions. *Elsner v. Uveges*, 34 Cal.4th 915 (2004); *Wilson v. 21st Century Ins. Co.*, 136 Cal.App.4th 97; *People v. Cullen*, 2003 WL 21019597 (3d Dist. 2003); *Gentry v. Murrieta*, 36 Cal.App.4th 1359 (1995); *Peat, Marwick Mitchell & Co. v. Superior Court*, 200 Cal.App.3d 272 (1988); *People v. Blakeslee*, 2 Cal.App.3d 831 (1969).

Another Sherlockian aphorism popular with lawyers and judges comes from the novella *Sign of the Four* (1890): "How often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth?" See *Mix v. Superior Court*, 124 Cal.App.4th 987 (2004) and *Aguimatang v. California State Lottery*, 234 Cal.App.3d 769 (1991) (on gathering facts to form theories rather than twisting facts to suit predetermined theories).

Beyond a shadow of doubt, Sherlock Holmes has entered the legal imagination and presumably is referenced far more in everyday legal work than published cases might suggest. But there is, of course, another famous Holmes, who has had considerable effect on California law: Oliver Wendell Holmes Jr., a Justice on the United States Supreme Court for nearly 30 years (1902-1932). Although known as the Great

Dissenter, this Holmes is probably the most widely cited jurist in American history. See *Huntington Beach City Council v. Superior Court*, 94 Cal.App.4th 1417 (2002) ("Judge Posner has called Oliver Wendell Holmes' dissent in *Lochner v. New York* (1905) 198 U.S. 42, 'the most famous opinion of our most famous judge,' and 'merely the greatest judicial opinion of the last hundred years.'") And with the availability of his private papers released in the 1980s, a number of new biographies have been published. E.g., G. Edward White, *Oliver Wendell Holmes, Jr.* (Oxford Univ. Press 2006). Holmes almost never missed a court session, walking from his house to court every day for nearly 30 years. Some have called him, by endurance alone, the Supreme Court's Cal Ripkin Jr. But does his influence in California law overshadow that of his fictional namesake?

Although the famous detective is known for a number of beloved quotes, Justice Holmes' quotes are equally well known, especially among lawyers, who appreciate his relatively short opinions and memorable sound bites encapsulating complicated legal theories: "clear and present danger" (*Younger v. Smith*, 30 Cal.App.3d 138 (1973)); "shout fire in a crowded theatre" (*Levin v. United Air Lines, Inc.*, 158 Cal.App.4th 1002 (2008)); "three generations of imbeciles are enough" (*Hecht v. Superior Court*, 59 Cal.Rptr. 222 (1996)); "a page of history is worth a volume of logic" (*People v. Skinner*, 39 Cal.3d 765 (1985)); "hard cases make bad law" (*Marilyn V. v. Oakland Unified Sch. Dist.*, 2002 WL 1402345); "the constant business of the law is to draw lines" (*Honeywell, Inc. v. State Bd. of Equalization*, 48 Cal.App.3d 907 (1975)); and the ever-popular, "the life of the law has not been logic; it has been experience" (*Resch v. Volkswagen of Am., Inc.*, 36 Cal.3d 676 (1984); *O'Grady v. Superior Court*, 139 Cal.App.4th 1423 (2006); *People v. McCoy*, 79 Cal.App.4th 67 (2000); *Fluharty v. Fluharty*, 59 Cal.App.4th 484 (1997); *City of Fresno v. People ex rel. Fresno Firefighters*, 71 Cal.App.4th 82 (1999) ("labor negotiations do not turn on logic, they turn on experience.")).

Holmes also provided much guidance in the field of statutory construction: "Whatever the consequences, we must accept the plain meaning of plain words" (*Pulaski v. California Occupational Safety & Health Standards Board*, 75 Cal.App.4th 1315 (1999)); "We do not inquire what the legislature meant; we ask only what the statute means" (*People v. Singh*, 92 Cal.App.4th Supp. 13 (2001); *J.A. Jones Constr. Co. v. Superior Court*, 27 Cal.App.4th 1568 (1994)); "there is no canon against using common sense in construing laws as saying what they obviously mean" (*People v. Dillon*, 34 Cal.3d 441 (1983)).

He also penned useful and widely quoted analyses of the uses and abuses of precedent: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." *Riddle v. Harmon*, 102 Cal.App.3d 524 (1980); see also *Mexicali Rose v. Superior Court*, 1 Cal.4th 617 (1992).

Justice Holmes' writings deeply affect the development of judging and judicial decision-making. His pragmatism and scholarly zingers seem immune from ever growing stale. See *In re George T.*, 102 Cal.App.4th 1422 (2002) ("Justice Oliver Wendell Holmes said he knew when something was unconstitutional because it made him want to puke."); *Page v. Mintzer*, 42 Cal.App. 694 (1919) ("The law is administered by able and experienced men, who know too much to sacrifice common sense").

In comparing The Master (a fan-nickname for Sherlock Holmes) to the Great Dissenter, it is clear that for all the former's cultural currency, the latter has had the greater influence on the development of California law. Both, indubitably, will continue to be quoted and cited in judicial opinions. But lest anyone doubt the strong connection between the great detective and the learned profession of judges and attorneys, we need go no further than note the current portrayer of Dr. Watson in this season's blockbuster film: yes, that's *Jude Law*.

Benjamin G. Shatz is a certified specialist in appellate law in the Appellate Practice Group of Manatt, Phelps & Phillips in Los Angeles. He is the chair of the Los Angeles County Bar Appellate Courts Committee and vice chair of the California State Bar Committee on Appellate Courts. He can be reached at BShatz@manatt.com.

© 2010 Daily Journal Corporation. All rights reserved.